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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1985

THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE COLORADO SUPREME COURT

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ISSUES PRESENTED FOR REVIEW

1. Does a valid waiver of the right to silence and the right to counsel necessarily require that the defendant be aware, prior to interrogation, of all of the possible subjects of interrogation?
2. Where a warned suspect has waived his rights and has agreed to answer questions, but then refuses to answer a particular question, does the Constitution impose a duty on the police to stop interrogation and to determine whether the suspect is exercising his privilege against self-incrimination in all respects?

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OPINION BELOW

The trial court's unreported ruling is included as Appendix A; the Colorado Court of Appeals' opinion is reported at 671 P2d 965 (1983), and included as Appendix B; the opinion of the Colorado Supreme Court is not yet reported, but is included as appendix C; the Order modifying the opinion and denying rehearing is attached as Appendix D.

JURISDICTION

The jurisdiction of this court is invoked pursuant to 28 U.S.C. sec. 1257 and rule 17.1(b) and (c) of the Rules of the Supreme Court.

The judgment of the Colorado Supreme Court was issued on October 2, 1985. The state's timely petition for rehearing was denied on January 13, 1986. The Colorado Supreme Court did not rely on any independent state ground for its decision; rather it based its decision upon *Miranda v. Arizona*, 384 U.S. 436 (1966), and subsequent cases interpreting the *Miranda* decision.

CONSTITUTIONAL PROVISIONS

Amendment V of the United States Constitution provides in pertinent part:

No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property without due process of law.

Amendment XIV, section 1 of the United States Constitution provides in pertinent part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . . .

FACTUAL BACKGROUND

In early February 1979, the respondent John Spring and Donald Wagner invited Donald Walker to accompany them elk hunting in the snowy mountains west of Craig, Colorado. Neither man liked Walker, because they believed he was a "snitch". In addition, Walker had dated the respondent's wife while the respondent was in prison.

The respondent suggested to Walker that Walker leave his .22 automatic pistol in the van. Then, while Walker approached a ravine to "pick an elk," the respondent shined a flashlight on him. Wagner shot him twice in the head. The two men then dragged the body to a ditch and kicked snow over it.

The respondent and Wagner later bragged about their deed to another friend, George Dennison, who proved to be an informant working with agents of the Federal Bureau of Alcohol, Tobacco and Firearms (ATF). Dennison related the information concerning the Colorado homicide (and other information concerning illegal gun transactions) to these agents.

On March 30, 1979, the respondent was arrested by ATF agents on federal firearms charges, and was twice advised of his constitutional rights. In addition, he was advised that if he decided to answer questions without the assistance of an attorney, he had the right to stop the questioning at any time or to stop the questioning until the presence of an attorney could be secured. The respondent was not specifically advised that he might be a murder suspect. He signed a written waiver form. He was then interrogated concerning the firearms violations. Toward the end of this interrogation, the respondent was asked if he

had a criminal record. He replied that he had a juvenile record, acquired at the age of 10 when he killed his aunt. The agent then asked if he had ever shot anyone else. The respondent ducked his head and mumbled, "I shot another guy once." The agent asked the respondent if he had ever been to Colorado; the respondent replied, "No." Finally, the agent asked whether the respondent had shot a man named Donny Walker west of Denver and thrown the body in a snowbank. There was a long pause, then the respondent ducked his head and said, "No." The interview was then ended.¹

On July 13, 1979, the same ATF agents again visited the respondent at the Kansas City jail. By that time, an information charging him with murder had been filed in Colorado, and he had entered a plea of guilty in the federal firearms case. The agents stated that they wished to talk to the respondent to "clean up some loose ends," and to discuss the hiding places of other firearms, and the identities of firearms "fences" in Kansas City. The respondent was again

¹ This first statement was never used at trial because the trial court ruled that the statement "I shot another guy once" was not relevant. The court ruled that the statement denying the Walker homicide was relevant, but the prosecution chose not to use it at trial.

The Colorado Supreme Court, citing *Wong Sun v. United States*, 371 U.S. 471 (1963), ruled that even though the first statement was not used, its constitutionality remained at issue because if it was illegally obtained, the prosecution must establish that the two subsequent statements were not the product of the tainted statement. This affected an otherwise unchallenged statement made by the respondent on May 26, 1979 (in which the respondent admitted his participation in the crime), as well as the statement of July 13, 1979, the second statement discussed in this brief. The Colorado Supreme Court later amended its opinion by the addition of footnote 6, stating that upon remand, the prosecutor would be free to assert to the trial court that under *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), the two subsequent statements would be admissible without regard to attenuation. However, since the trial court has already ruled that both subsequent statements were voluntary, *Oregon v. Elstad* obviates a remand; the statements clearly are admissible as a matter of law.

advised of his *Miranda* rights, and the additional warning that he had the right to stop questioning at any time. He acknowledged that he understood his rights, but refused to sign any form without his attorney. The agents closed up their clipboards and stood to leave. The respondent stopped them, saying that he knew his rights, he did not want to sign anything, but he was willing to talk with them. The agents resumed the interview.

The July 13 interrogation included discussion of various firearms and explosives, general conversation concerning the respondent's activities in Colorado, the Colorado homicide, and other homicides and crimes of which the respondent was suspected. The respondent appeared relaxed. On some topics he was talkative, on others, not talkative. He was told that if he wanted to answer the questions, that was fine, but that he did not have to. He replied that he understood that. On the topic of the Walker murder, several questions were not answered, several were answered with a shrug of the shoulder, and once or twice the respondent replied, "I'd rather not talk about that." Some of the additional murders and crimes he denied. To questions concerning others he replied, "I don't want to talk about that." The respondent did not request that all questioning end or that the agents leave. He did not request an attorney. Each time that the respondent said that he would rather not talk about that, the agents went on to a different question, which the respondent readily answered. During this conversation, the respondent revealed little that the authorities did not already know. However, he did inform them that the .22 caliber gun which he had been carrying at the time of his arrest he had taken from Walker when Walker died.

STATE COURT PROCEEDINGS

The respondent filed a pretrial motion to suppress the statements. At a hearing conducted on this motion on March 17, 1980, the trial court ruled that all of the statements were admissible.

On appeal, a divided court of appeals ruled that the statements were inadmissible. *People v. Spring*, 671 P.2d 965 (Colo. App. 1983). The court of appeals imposed a *per se* rule, requiring that the police specifically inform the suspect of the crime of which he is suspected; without such a warning, the court reasoned, there could be no knowing and intelligent waiver of rights. The court of appeals also excluded the other statement, concluding that by refusing to answer some questions regarding the homicide, the respondent was exercising his right to silence as to all matters concerning the homicide. Additionally, the court of appeals held that since the agents did not initially state that the murder would be a topic of interrogation, the respondent was entitled to renewed *Miranda* warnings when they questioned him about the murder.

A majority of the Colorado Supreme Court affirmed the court of appeals, on somewhat different grounds. Concerning the first statement, the Court ruled that in determining whether a waiver is valid, whether and to what extent a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is a major (and in some cases determinative) factor. Reasoning that on March 30, 1979, the respondent had no reason to suspect that the federal ATF agents would question him about a Colorado homicide, the Court ruled that the People failed to prove that he made a voluntary, knowing and intelligent waiver of his constitutional rights. Concerning the state-

ment of July 13, 1979, the Colorado Supreme Court ruled that it was inadmissible because, "Once the defendant has indicated in any way that he does not want to answer a question or questions, the interrogating officers have an affirmative and emphatic duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects, or is merely reluctant to answer particular questions."

REASONS TO ALLOW THE WRIT

This court should issue its writ and review the holding of the Colorado Supreme Court because the Colorado court has decided two important questions of United States Constitutional law in a way that by all indications would not be sanctioned by this court. The two issues highlight different aspects of the law of waiver, aspects which continually recur; both issues have been treated in widely disparate ways by the state and federal courts. The manner in which the Colorado court resolved these issues will have far-reaching implications for the use of confessions in criminal trials. A decision by this court is necessary in order to clarify and explain its prior holdings, to provide clear guidelines to law enforcement officers, and to develop the law surrounding waivers of fifth amendment rights.

The first question presented by this case is whether a suspect in custody who has been properly advised of his *Miranda* rights, but not advised of the nature of the crime or crimes of which he is suspected, can make a knowing and intelligent waiver of his rights. Because some of the lower federal and state courts, including Colorado, have confused the distinction between the requirement that a waiver be knowing and intelligent (which addresses those matters of

which the suspect must be aware) and the requirement that the waiver be voluntary (which addresses the need for the decision of the suspect to be free from improper influences), much of the case law on the point is either unclear or not well reasoned. In addition, even those jurisdictions which have made the distinction do not agree concerning the nature and extent of the information of which the suspect must be aware before he can knowingly and intelligently waive his rights. Consequently, the various jurisdictions have reached widely different results in situations which are factually similar.

Some jurisdictions have held that information concerning the possible charges is not relevant in determining the validity of a waiver.² At the opposite end of the spectrum, several have adopted a *per se* rule, much like the Colorado Court of Appeals, requiring that the suspect be told the exact nature of the charges upon which he will be questioned.³ A number of courts, including the Colorado Supreme Court, follow a rule that the suspect's knowledge of the crime is a significant factor to be considered in

² *United States ex rel. Henne v. Fike*, 563 F.2d 809 (7th Cir. 1977); *United States v. Anderson*, 533 F.2d 1210 (D.C. Cir. 1976); *United States v. Campbell*, 431 F.2d 97 (9th Cir. 1970); *James v. State*, 230 Ga. 29, 195 S.E.2d 448 (1973); *People v. Merchel*, 91 Ill. App. 3d 285, 414 N.E.2d 804 (1980); *State v. Woods*, 117 Wis. 2d 701, 345 N.W.2d 457 (1984).

³ *Schenk v. Ellsworth*, 293 F. Supp. 26 (D. Mont. 1968); *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160 (1969); see also *Commonwealth v. Richman*, 458 Pa. 167, 320 A.2d 351 (1974); *State v. Goff*, 289 S. Ed. 2d 473, 477 n.8 (W. Va. 1982).

determining the validity of the waiver.⁴ Several courts have adopted the "totality of the circumstances" rule, but then have held that a defendant who actually did not know the true nature of the charges against him was nonetheless able to render a knowing and intelligent waiver.⁵ This is an issue which has been considered often, but upon which there is no agreement; clearly the jurisdictions are struggling with the concept of waiver in the context of fifth amendment rights.

It is not apparent why the lower federal and state courts are in such disarray, since the decisions of this court do indicate the exact information which must be given to a suspect to support a knowing and intelligent waiver. Many years ago, this court defined a waiver as the intentional and voluntary relinquishment of a known right. *Johnson v. Zerbst*, 304 U.S. 458 (1938). *Miranda v. Arizona*, 384 U.S. 436 (1966), set forth specifically the four warnings which must be given to a suspect in custody before his waiver of rights can be considered knowing and intelligent. The suspect must be warned that he has the right to remain silent and to have an attorney present; it must further be explained that if he cannot afford an attorney, one will be appointed for him. The suspect must also be warned of the consequences of waiving these rights: i.e., anything he says

⁴ *Carter v. Garrison*, 656 F.2d 68 (4th Cir. 1981), cert. denied, 455 U.S. 952; *Collins v. Brierly*, 492 F.2d 735 (3rd Cir. 1974), cert. denied, 419 U.S. 877; *People v. Spring*, 83SC145 (Colo. Dec. 2, 1985); *State v. Falby*, 187 Conn. 6, 444 A.2d 213 (1982); *State v. Williams*, 434 So.2d 967 (Fla. App. 1983); *People v. Murphy*, 17 Ill. App.3d 482, 308 N.E.2d 235 (1974); *State v. Condon*, 468 A.2d 1348 (Me. 1983) cert. denied, 104 S. Ct. 2385; *State v. Jones*, 125 N.H. 490, 484 A.2d 1070 (1984); *State v. Stearns*, 620 S.W.2d 92 (Tenn. Crim. App. 1981); see also *United States v. McCrary*, 643 F.2d 323 (5th Cir. 1981).

⁵ *Lewis v. United States*, 483 A.2d 1125 (D.C. App. 1984); *Commonwealth v. Tatro*, 4 Mass. App. 295, 346 N.E.2d 724 (1976); *State v. Carter*, 296 N.C. 344, 205 S.E.2d 263 (1979).

can and will be used against him in a court of law. Nowhere in *Miranda* is there any indication that the suspect must be given any other specific warning or information, such as the nature or elements of the crime, the full extent of the knowledge of the police, or the possible consequences of conviction. If a properly warned suspect understands these rights and consequences, but chooses to forego his rights without any persuasion by the authorities, then, under *Johnson v. Zerbst*, *supra*, and *Miranda*, he has intentionally and voluntarily relinquished his known rights.

Some of the confusion in the state and lower courts appears to have been generated by this Court's reference in *Miranda* and subsequent cases to the requirement that the suspect understand the consequences of waiving his rights. *Fare v. C*, 442 U.S. 707, 725 (1979) (the reviewing court must evaluate whether the suspect "has the capacity to understand ... the consequences of waiving those rights.") For example, Colorado relied upon *United States v. McCrary*, 643 F.2d 323, 328-29 (5th Cir. 1981) and *Commonwealth v. Collins*, 436 Pa. 114, 259 A.2d 160, 163 (1969) in holding that a knowing and intelligent waiver must be supported by actual knowledge of the charges, because the consequences of waiver will differ depending on the severity of the charges. The inference is that unless the suspect knows the charges, he cannot understand all of the possible legal consequences that a waiver of his rights might produce.

These courts have gone too far afield. *Miranda* clearly stated that the warning that any statement made by the suspect can and will be used against him is necessary in order to make the suspect aware of the consequences of foregoing his rights. 384 U.S. at 469. This means that the

suspect need not be aware of *all* of the possible legal consequences of waiver—only of the consequence that his statements will be used against him.

This conclusion is supported by the recently decided case of *Moran v. Burbine*, No. 84-1485 (U.S. March 10, 1986), where the suspect was not told that an attorney hired by his relatives was available to him. In holding that *Miranda* imposed no duty on the authorities to inform the suspect of this fact, the Court wrote:

No doubt, the additional information would have been useful to the respondent; perhaps even it might have affected his decision to confess. But we have never read the Constitution to require that the police supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights.

Accord: Oregon v. Elstad, 105 S.C. 1285, 1297 (1985).

Clearly, the only information required by the United States Constitution for a knowing and intelligent waiver of fifth amendment rights is the knowledge of those rights, and the understanding that the consequence of waiver is that any statements made may be used against the suspect.

In this case, the Supreme Court of Colorado held that a suspect cannot knowingly and intelligently waive his rights unless he has some knowledge of the crime upon which questioning will focus, as the knowledge will have an “impact” on the suspect’s decision of whether or not to waive

his constitutional rights.⁶ Colorado has not stated why this particular information has assumed a constitutional status, whereas other information, equally or more pertinent, has not. There are numerous facts, the knowledge of which could have a major impact on a decision whether or not to waive constitutional rights: the elements of the crime, the possible penalties, even the district attorney’s or the local judges’ attitudes toward repentant as opposed to recalcitrant offenders—yet neither the Constitution nor *Miranda* requires that such information be supplied. “Knowing and intelligent” does not mean that the suspect knows all of the information which a careful attorney would demand before determining whether waiver would be the wisest course of action under the circumstances. It is not in the sense of shrewdness or wisdom that *Miranda* speaks of an “intelligent” waiver; a waiver is “intelligent,” even if foolish, where it is made with a full understanding of the option to remain silent and to consult an attorney, and of the consequences—that the statement may be used against the suspect. *Collins v. Brierly*, 492 F.2d 735, 738-39 (3rd Cir. 1974), cert. denied, 419 U.S. 877.

The Colorado court erroneously shifted its focus from the suspect’s knowledge and understanding of his rights to the suspect’s knowledge of his circumstances. Rather than determining whether the suspect knew that he had a right to silence and to an attorney, the Colorado court focused on whether the defendant knew exactly which of his prior crimes the law enforcement officials planned to discuss

⁶ The Colorado Supreme Court did not specify in the opinion whether the lack of knowledge affected the knowingness, the intelligence, or the voluntariness of the waiver, but held that “the People did not meet their heavy burden of proving that Spring’s answers . . . were made after a voluntary, knowing and intelligent waiver of rights.”

with him. Thus, it is clear that Colorado, without justification, has imposed a requirement under the guise of federal law which is far more strict than any requirement ever contemplated by this court. Such a requirement adds no protection to the suspect's fifth amendment right not to be compelled to testify against himself, yet hinders law enforcement and excludes reliable and probative evidence, at a great cost to society.

The second issue presented by this case is whether a duty of inquiry must be imposed on interrogating officials when a suspect who has waived his rights and agreed to interrogation refuses to answer a specific question.

In this case, the Colorado Supreme Court held that once a suspect has in *any way* indicated that he does not wish to answer a question or questions, interrogating officers have an affirmative and emphatic duty to determine whether he is exercising his privilege against self-incrimination in all respects, or is merely reluctant to answer particular questions.⁷ Under a literal reading of this rule, even a clear, unambiguous statement clarifying which areas the subject does wish to speak about and which areas he does not wish to speak about would impose an absolute duty on the police to suspend questioning and redetermine the intent and extent of the defendant's waiver. Colorado stands alone in imposing, as a matter of federal

constitutional law, such a requirement where the suspect has clearly refused to answer only a particular question.⁸

This court has never stated that a suspect may not exercise his right to silence selectively. In *Fare v. C.*, *supra*, the court noted in passing that "(A)t some points (the suspect) did state that he did not know the answer to a question put to him or that he could not, or would not, answer the question, but these statements were not assertions of his right to remain silent." 442 U.S. at 727. This infers that a defendant has the right to state that he will not answer a question; such a statement, clearly directed to a particular question, does not impose any particular duty of clarification on the police. See *Michigan v. Moseley*, 423 U.S. 96 (1975), where this court noted that a suspect can control the subjects discussed, yet made no mention of any particular duty imposed on the police in the event that the suspect chooses not to answer a question on a particular subject. To the extent that the Colorado rule is taken literally, then, it imposes a much greater restriction upon the police, as a matter of federal constitutional law, than this court ever has.

In spite of its emphatic language, the Colorado Supreme Court's opinion here arguably could be read to impose a duty of clarification only where a suspect's remark

⁷ The statement "I would rather not answer that" does not suggest in any way that the suspect was invoking his right to counsel. Even if ambiguous, at most it suggests that the suspect might have meant to assert his right to silence. Therefore, *Edwards v. Arizona*, 451 U.S. 477 (1981) does not apply to this case.

⁸ *United States v. Thierman*, 678 F.2d 1331 (9th Cir. 1982); *Taylor v. Riddle*, 563 F.2d 133 (4th Cir. 1977), cert. denied, 434 U.S. 1020; *United States v. Joyner*, 539 F.2d 1162 (8th Cir. 1976), cert. denied, 429 U.S. 983; *United States v. Vasquez*, 476 F.2d 730 (1973), cert. denied, 414 U.S. 836; *United States v. Matthews*, 417 F. Supp. 813 (E.D. Pa. 1976), cert. denied, 459 U.S. 1111; *State v. Anspaugh*, 97 Idaho 519, 547 P.2d 1124 (1976); *State v. Fincher*, 309 N.C. 1, 305 S.E.2d 685 (1983); *State v. House*, 54 Ohio St. 2d 297, 376 N.E.2d 588 (1978).

is ambiguous.⁹ Even in this instance, however, the states and circuits do not agree on the rule to be applied; a number of courts have held that, at least where the defendant is possessed of normal communication skills, it will be assumed that if he wished to reassert his rights after a waiver, he would do so in clear language. Consequently, an ambiguous remark may be ignored by the police.¹⁰ Other jurisdictions have, in the same circumstances, imposed a duty to stop and readvise.¹¹ Finally, a number of jurisdictions have taken a middle approach: the police, when confronted by an arguably ambiguous statement, may choose to continue interrogation; the court will later determine, upon an examination of the totality of the circum-

stances, whether the defendant's right to cut off questioning was scrupulously honored as required by *Michigan v. Moseley*, *supra*.¹²

The decisions of this court to date offer little guidance on the issue. In *Fare v. C.*, *supra*, a juvenile was advised of his rights and then asked to see his parole officer. When the police denied this request, the juvenile stated that he would talk with them without consulting an attorney. The California Supreme Court ruled that this was a *per se* invocation of the fifth amendment right to silence. *In re Michael C.*, 21 Cal. 3d 471, 579 P.2d 7, 146 Cal. Rptr. 358 (1978). Noting that such a request could have different meanings in different circumstances, this Court refused to consider the ambiguous statement as an assertion of rights:

[I]n the absence of further evidence that the minor intended in the circumstances to invoke his fifth amendment rights by such a request, we decline to attach such overwhelming significance to this request.

Fare v. C., *supra*, 442 U.S. 724.

This language is itself ambiguous; it can be read to require that in a situation where only an ambiguous statement has been made, the suspect must prove that he intended to invoke his rights thereby, or it could be read as imposing a totality of the circumstances rule. What the case clearly did not do was impose any duty of readvertisement or clarification upon the police in the face of an ambiguous statement.

12 Smith v. United States, 505 F.2d 824 (6th Cir. 1974); *People v. Hayes*, 38 Cal. 3d 780, 699 P.2d 1259, 214 Cal. Rptr. 652 (1985); *Shriner v. State*, 386 So. 2d 525 (Fla. 1980); *Conway v. State*, 7 Md. App. 400, 256 A.2d 178 (1969); *People v. Topping*, 426 N.Y.S.2d 116 (App. Div. 3d Dept., 1980); *State v. Woods*, 374 N.W.2d 92 (S.D. 1985); *State v. Despenza*, 38 Wash. App. 645, 689 P.2d 87 (1984).

9 The Colorado Supreme Court stated,

We recognize that an individual might refuse to answer certain questions yet voluntarily and intelligently decide to answer others during the course of a single interrogation, and a waiver established under such circumstances may be valid and effective.

10 *Vail v. State*, 599 P.2d 1371 (Alaska 1979); *Reeves v. State*, 241 Ga. 44, 243 S.E.2d 24 (1978); *State v. Nichols*, 212 Kan. 814, 512 P.2d 329 (1973); *State v. Perkins*, 219 Neb. 491, 364 N.W.2d 20 (1985); *Lamb v. Commonwealth*, 217 Va. 307, 227 S.E.2d 737 (1976). See also *State v. Padilla*, 101 Idaho 713, 620 P.2d 286 (1980); *State v. Bradfield*, 29 Wash. App. 679, 630 P.2d 494 (1981). Until Spring, the Colorado Supreme Court took this approach. See *People v. Roark*, 643 P.2d 756 (Colo. 1982) ("Had the defendant wished to terminate all further interrogation, he easily could have done so by simply stating that he did not want to answer any further questions.")

11 *Martin v. Wainwright*, 770 F.2d 918 (11th Cir. 1985); *United States v. Riggs*, 537 F.2d 1219 (4th Cir. 1976); *United States v. Nielsen*, 392 F.2d 849 (7th Cir. 1968); *State v. Lawson*, 144 Ariz. 547, 698 P.2d 1266 (1985); *State v. Ayers*, 433 A.2d 356 (Me. 1981), *cert denied*, 104 S. Ct. 1919.

It appears that, as a matter of federal constitutional law, Colorado has imposed a far more strict duty upon law enforcement personnel than this court would consider to be necessary under the due process clause. Highly probative evidence which is constitutionally unobjectionable is nonetheless being suppressed. Perhaps most importantly, the police have been placed in an impossible position. Under the Colorado rule, they must instantly assess every word uttered by a suspect, for fear that a later, more leisurely review of a cold record may reveal words or phrases which are arguably ambiguous, resulting in the suppression of evidence which in actuality was lawfully obtained.

CONCLUSION

These two issues present important constitutional questions concerning the theory and application of the law of waiver of *Miranda* rights. In *Moran v. Burbine*, supra, this court stated that *Oregon v. Elstad*, supra, foreclosed the argument that the police must inform a suspect in custody of all information relevant to his decision whether or not to waive. It is readily apparent that the state and lower federal courts have not perceived this yet. A significant degree of judicial bewilderment surrounds the second issue, as well. Law enforcement officers in the field are in need of precise rules, so that they may know when interrogation may proceed, and when it may continue. In the meantime, society is suffering by the exclusion of reliable evidence in cases where no violation of a suspect's procedural or substantive rights has occurred. The effects of this case reach far beyond Colorado, because the case was decided on federal rather than state grounds, and will undoubtedly be relied upon in the future by others courts

confronted by the issues raised here.

This court recently accepted certiorari jurisdiction in *Colorado v. Connelly*, No. 85-660 (cert. granted January 13, 1986), which concerns the "voluntary" component of a *Miranda* waiver. The panoply of confused and inconsistent rulings of the lower federal and state courts concerning the "knowing and intelligent" aspect of a *Miranda* waiver demonstrates that there are even more compelling reasons to review this case. A review of *Colorado v. Connelly* and *Colorado v. Spring* together is next, after *Burbine*, in logical progression. The grant of a writ of certiorari in this case would present this court with an opportunity to set forth a full, working definition of the elements required for a knowing, intelligent and voluntary waiver of fifth amendment rights.¹³

¹³ If this Court trusts that *Moran v. Burbine* has so clarified the law concerning the "knowing and intelligent" aspect of waiver that no further elucidation is necessary, then the petitioner requests that the writ of certiorari be granted, and that this case be summarily reversed on the application of federal law.

Respectfully submitted,
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IN THE DISTRICT COURT OF THE FOURTEENTH
JUDICIAL DISTRICT

IN AND FOR THE COUNTY OF MOFFAT AND STATE
OF COLORADO

Criminal Action Number 79CR40

PEOPLE OF THE STATE OF COLORADO,
Plaintiff,

vs.

JOHN LEROY SPRING,

Defendant.

THIS MATTER came regularly before the Court upon the Defendant's Motion to Suppress evidence and statements made by the Defendant to law enforcement officers and agents, and his Motion to Dismiss Count V of the Information. The matter was heard by the Court on March 17, 1980, commencing at 10:00 a.m. The Defendant appeared in person and was represented by Paul R. Bratfisch and Michael Gallagher, Attorneys at Law. The People were represented by Carroll E. Multz and Richard D. Saba. The Court took the testimony and received documentary evidence presented at the March 17, 1980, hearing and has considered the briefs submitted by respective Counsel and their arguments presented at the hearing, and being now fully advised FINDS, CONCLUDES and ORDERS as follows:

1. John Leroy Spring was arrested on March 30, 1979, in Kansas City, Missouri, by agents of the Bureau of

Alcohol, Tobacco, and Firearms for interstate transportation of stolen firearms, dealing in firearms without a license, and other related offenses. This arrest was made after the ATF agents, acting upon information provided by an informant named George Dennison, had set up a buy and sell transaction for firearms with Spring, and after the transaction had been substantially concluded in a K Mart parking lot in Kansas City, Missouri.

2. Prior to Spring's arrest on March 30, 1979, Dennison had also given information to the ATF agents concerning Spring's statement to Dennison that he (Spring) and another person had killed one Don Walker in Colorado in February, 1979.

3. At the time of Spring's arrest on March 30, 1979, the evidence shows that the ATF agents were acting without an arrest warrant; had arranged the sale through Dennison, and had actively participated in negotiations for the sale and delivery of firearms from Spring to undercover agents in the K Mart parking lot. The officers actually observed the firearms in the trunk of the vehicle in which Spring arrived at the parking lot, and were in the process of transferring the firearms from that vehicle to the ATF undercover vehicle when the arrest was made. Thus there was probable cause for this arrest based both upon the information given by Dennison, and independently upon the direct personal observations of a crime in progress by the ATF agents.

4. At the time of the arrest and incident thereto, the ATF agents conducted a pat down search, and removed a .22 cal. pistol (Exhibit F) from Spring's jacket pocket.

5. Spring was advised by ATF agent Malooly at the scene of the arrest pursuant to the standard Miranda warning. Spring was then transported to the ATF Bureau Office in Kansas City, and was there re-advised of his rights by Agent Sadowski. Spring indicated to Agents Sadowski and Patterson that he understood his rights, and signed a written form waiving and acknowledging his rights in connection with the interrogation by Patterson and Sadowski, which ensued immediately.

6. The thrust of the interrogation conducted by the ATF agents on March 30, 1979, was directed toward the firearm transactions with which they were directly concerned. The agents were aware of Dennison's information concerning Spring's admission of involvement in a Colorado homicide, and did ask a few questions relating to that incident. Patterson asked Spring about a prior incident in which Spring shot an aunt as a juvenile. He then asked Spring if he had ever shot anyone else. Spring answered: "I shot another guy once." Patterson then asked Spring if he had been in Colorado and Spring replied, "No." Patterson asked if it were true that Spring had killed a Don Walker west of Denver and thrown the body in a snowbank. Spring said, "No."

7. The Court finds that this questioning was conducted while the Defendant was in lawful custody, pursuant to a valid arrest; that Spring had been properly advised of his rights and was aware of his right to remain silent, to have Counsel present during interrogation, to stop the interrogation at any time; and that his responses to the interrogation were made freely, voluntarily and intelligently; that there was no element of duress or coercion used to induce Spring's statements on March 30, 1979.

8. Though it is true that Patterson and Sadowski did not specifically advise Spring that a part of their interrogation would include questions about a Colorado homicide, the questions themselves suggested the topic of inquiry. The questions dealt with "shooting anyone" and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised of his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

10. The .22 cal. pistol was lawfully seized in a lawful search pursuant to a valid and lawful arrest and should not be suppressed. Exhibit F is deemed admissible in evidence.

11. On May 26, 1979, Detective Curtis of the Moffat County Sheriff's Department and Agent Leo Konkel of the Colorado Bureau of Investigation interviewed Spring at the Jackson County Jail in Kansas City, Missouri. These Officers again advised Spring of his "Miranda" rights and Spring once again executed a written acknowledgement and waiver form. The Officers identified themselves, and told Spring they wanted to question him about the Walker homicide. Spring told the Officers he wanted to get it off his chest. The interview lasted approximately 1-1/2 hours, and

during that time Spring talked freely to the Officers, did not elect to refuse to answer any questions, and never requested Counsel during the interview, although he was aware of his right to remain silent, to stop the interrogation, and to have Counsel present. There is no evidence that the interrogation, conducted in the "day room" of the jail was conducted in a coercive manner or that any threats or promises were made to Spring to induce his participation in the interview. After the interview was completed, Spring read and edited a written statement summarizing the interview prepared by Konkel, and signed the written statement. The Court finds that the statement given by Spring on May 26, 1979, was made freely, voluntarily, and intelligently, after his being properly and fully advised of his rights, and that the statement should not be suppressed, but should be admitted in evidence.

12. Spring was next interviewed by Agent Patterson at the Jackson County Jail on July 13, 1979, after Spring had been found guilty of the firearms violations. Patterson's primary purpose of conducting this interview was to obtain additional information concerning Spring's knowledge of an additional cache of firearms and explosives. Agents Patterson and Wactor conducted this interview. They met Spring, Patterson identified the agents, and Spring laughingly said, "I know who you guys are." Spring was re-advised pursuant to the "Miranda" requirements using the standard ATF advisement and waiver form. Upon being advised on this occasion, Spring said, "I understand my rights but I won't sign anything without a Lawyer."

13. Patterson and Wactor got up and started to leave. As the agents were exiting the day room, Spring said, "I won't sign any forms without a Lawyer, but I'll talk to you."

The agents then sat back down and continued their discussion with Spring. During this interrogation, Spring admitted being in Colorado in 1979. He was asked about firearms, and he was specifically asked where he got the .22 cal. pistol the agents had seized (Exhibit F). Spring said, "That's Walker's gun."

Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Asked if he shot Walker, Spring said, "I'd rather not talk about that." Asked if Wagner had shot Walker, Spring said, "I'd rather not talk about that."

Spring did say that he, Wagner and Walker had been riding around together, and that he had gotten the gun from Walker before Walker went into the ravine.

Patterson asked, "Is it safe to assume that you, Wagner and Walker went out together and that only you and Wagner came back alive?" Spring replied, "Yeah, you could say that."

14. The Defendant urges that the statements made during the July 13th interview should be suppressed because of the continued interrogation after a request for Counsel. From the evidence presented, however, the request for Counsel was not for advise during interrogation, but for the purpose of advising him if he were to be asked to sign any "forms." Spring indicated that he did understand his right to remain silent, but that he did not want to exercise that right. He also was aware of his right to Counsel, but elected not to request Counsel unless "forms" were to be signed. He was advised that any statement he made might be used against him, and indicated that he understood that warning as well as the other "Miranda" warnings.

Spring did understand that he had the right not to answer questions, and exercised that right with respect to several specific questions.

Spring further urges that again he was not advised prior to the interview that he would be questioned about the Walker homicide. However, once, again, the questions were not disguised ruse questions designed to trick an unwary person into admitting involvement in a crime of which he was totally unaware. By July 13, 1979, Spring had already told Curtis and Konkel about his involvement with Wagner in the shooting of Walker in the May 26th interview. In addition, by that time a warrant had been issued by this Court upon an Information charging Spring with Walker's murder. The arrest warrant issued on May 29th, 1979, and a hold had been placed on Spring in connection with the Moffat County murder charge before the July 13th interview.

15. The Court concludes that Spring made the July 13 statements to Patterson and Wacter after being fully and adequately advised of his "Miranda" rights, and that he knowingly and intelligently waived his right to remain silent or to have an Attorney present during questioning. The statements were made without inducement by coercion or threat. No promises were made by the agents to induce his statements. The statements of July 13, 1979, should not be suppressed, and should be admitted in evidence.

16. The Defendant contends as a matter of law that Count V of the Amended Information must be dismissed because the conviction therein alleged occurred after the date of commission of the principal offense of Murder as contained in Count I of the Information. The alleged date of

the murder is "on or about the 1st day of February, 1979..." The date of the conviction relied upon in Count V of the Information to support penalty enhancement under C.R.S. 1973, 16-13-101, is July 5, 1979.

17. C.R.S. 16-13-101 provides "Every person convicted... who, *within ten years of the date of the commission of said offense, has been twice previously convicted ...*" (emphasis added) shall be adjudged an habitual criminal. The Statute on its face would seem to require that the previous convictions relied upon must antedate the date of commission of the primary offense rather than the date of trial or conviction of the primary offense. This construction is consistent with the construction of similar Statutes in other States. See Annot. 24 ALR2d 1247, 1249. Such construction is also consistent with the general rule that criminal Statutes in derogation of the common law must be strictly construed, and doubtful questions of construction must be resolved in favor of the accused. The Court therefore concludes that Count V must be dismissed for failure to properly charge a criminal offense. Further, the dismissal of Count V will render Count IV of the Complaint Information invalid to state an offense and Count IV will, by dismissal of Count V, be mere surplusage. Count IV should also be dismissed.

For the foregoing reasons and based upon the Findings and Conclusions stated above,

IT IS ORDERED that the Defendant's Motion to Suppress evidence and statements is DENIED.

IT IS FURTHER ORDERED that the Defendant's Motion to dismiss Count V of the Information is GRANTED.

IT IS FURTHER ORDERED that Count IV of the Information is DISMISSED and STRICKEN as surplusage.

DATED this 4th day of April, 1980, at Craig, Colorado.
BY THE COURT:

Claus J. Hume, District Judge

Copies to:	Carroll E. Multz	Paul Bratfisch
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	Moffat County Courthouse Box AK	
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COLORADO COURT OF APPEALS

No. 80CA1081

THE PEOPLE OF THE
STATE OF COLORADO.

Plaintiff-Appellee,

vs.

JOHN LEROY SPRING,

Defendant-Appellant.

Appeal from the District Court of Moffat County

Honorable Claus J. Hume, Judge

DIVISION III

Opinion by JUDGE TURSI

Kirshbaum, J. concurs

Van Cise, J. dissents

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Appealing his conviction for first degree murder in the death of Donald Walker, defendant, John Spring, contends the trial court erred in denying his motion to suppress three separate statements made while in custody for an unrelated offense. We find error in the suppression rulings, and accordingly, we reverse and remand for new trial.

I

Federal Alcohol, Tobacco & Firearms (ATF) agents in Kansas City, Missouri, learned from an informant that Spring was selling stolen weapons and that he had been involved in the early February shooting of Donald Walker near Craig, Colorado. At ATF's request, this informant contacted Spring, and on March 22, 1979, recorded a phone conversation which arguably implicated Spring in Walker's death. Spring ultimately was arrested in Kansas City on March 30, 1979, by undercover ATF agents to whom he was selling stolen weapons.

Spring signed a formal waiver of his rights under *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966) with reference to the charges for which he was in ATF's custody, and the arresting agents questioned him about weapons transactions. Later in the interview, however, these same agents questioned him about the Colorado shooting. At no time was Spring informed that the agents already suspected him of murder in Walker's death, and he was not readvised of his rights when questioned in that regard.

Waivers of constitutional rights not only must be voluntary but must also be knowing, intelligent acts done with an awareness of the relevant circumstances and likely consequences. *Brady v. U.S.*, 397 U.S. 742, 90 S.Ct. 1463, 25

L.Ed.2d 747 (1970); *Edwards v. Arizona*, 451 U.S. 477, 101 S.Ct. 1880, 68 L.Ed.2d 378 (1981).

An advisement of the privilege against self-incrimination and of right to counsel is sufficient if the accused fully knows the general nature of the crime involved. *People v. Weaver*, 179 Colo. 331, 500 P2d 980 (1972). If knowledge of the crime is withheld, a suspect cannot intelligently make the decision as to whether he wants counsel. *Schenck v. Ellsworth*, 293 F. Supp. 26 (D. Montana 1968). Therefore, Spring's waiver of his rights to silence and the presence of counsel with regard to the weapons-related conduct did not operate as a waiver of those rights with regard to unrelated criminal conduct which had occurred some two months previously in Colorado. See *U.S. v. McCrary*, 643 F.2d 323 (5th Cir. 1981).

The agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder. See *McClain v. People*, 178 Colo 103, 495 P2d 542 (1972). Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly or intelligently. *U.S. v. McCrary*, *supra*. Spring's responses are accordingly rendered inadmissible, and his conviction must be reversed.

II

ATF forwarded the results of its March interrogation to the Colorado Bureau of Investigation, and CBI agents traveled to Missouri and obtained a written statement from Spring on May 26, 1979. The record is silent as to what other information was in CBI's possession to link Spring to the Walker homicide.

Defendant argues that, if the March 30 statement to

the ATF is inadmissible, the statement obtained by the CBI on May 26 is "fruit of the poisonous tree," and must be suppressed. *See Wong Sun v. U.S.*, 371 U.S. 471, 83 S.Ct. 407, 9 L.Ed.2d 441 (1963).

If the May 26 statement was obtained by means significantly distinguishable from that used in obtaining the March 30 statement so as to be purged of the primary taint arising from the March 30 questioning, the statement would be admissible. *People v. Founds*, 621 P.2d 325 (Colo. 1981). It is the People's burden to establish that the statement was not the product of Spring's prior incriminating statements. *People v. Lowe*, 200 Colo. 470, 616 P.2d 118 (Colo. 1980). This burden was not met.

III

The trial court also erred in admitting the statements Spring made to ATF agents on July 13, 1979. The agents came to Spring for the stated purpose of "tying up loose ends" in the weapons case, to which by then he had pled guilty. Spring orally waived his *Miranda* rights and spoke freely with the agents. However, when the agents began asking about the homicide, Spring answered, "I'd rather not talk about that." The agents shifted the interview to other topics, but returned again to the homicide. This process was repeated until the agents obtained an incriminating response.

A waiver of *Miranda* rights must be established by clear and convincing evidence based on all circumstances, including details of the interrogation and defendant's conduct. While Spring waived his rights to silence and counsel as to the weapons charges, he did invoke his right to silence as to the homicide. *People v. Lowe, supra*. Officers who meet

with a refusal to make any statement during an attempted in-custody interrogation are not permitted periodically to repeat the procedure until the accused finally makes a statement. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972). Further, we hold that Spring was entitled to renewed *Miranda* warnings when the agents began to question him on crimes unrelated to the stated purpose for their inquiry. *U.S. v. McCrary, supra*; *McClain v. People, supra*.

The judgment of conviction is reversed and the cause is remanded for new trial, with directions that if the People seek the introduction of the May 26 statement on retrial, the trial court must first resolve the issue of attenuation from the tainted statement of March 30.

JUDGE KIRSHBAUM concurs

JUDGE VAN CISE dissents.

JUDGE VAN CISE dissenting:

I respectfully dissent. In my opinion, the statements made by the defendant on each of the three occasions were voluntary and he was adequately advised each time.

As for the first statement made on March 30 to ATF agents, subsequent to the defendant's arrest that day for illegal possession and sale of stolen firearms, defendant was twice advised of his rights before questioning. He indicated that he understood his rights, signed a written acknowledgement and waiver, and, as found by the court, responded "freely, voluntarily, and intelligently" to the questions asked.

The defendant's arrest related to his possession and sale of certain stolen firearms, one of which he had obtained

from the murder victim, Walker. Another possible, related charge, was the violation of the federal law prohibiting prior convicted felons from possessing firearms. Therefore, the defendant's prior criminal record and use of guns, as well as the source of the stolen guns found in the defendant's possession that day, were clearly reasonable, foreseeable subject matters of questioning.

In order to validate a waiver by a defendant of his *Miranda* rights as knowingly, intelligently, and voluntarily made, the defendant, after the *Miranda* warning, need not be informed of specific charges which may be brought against him. *People v. Herrera*, 633 P.2d 1091 (Colo. App. 1981), citing *People v. Casey*, 185 Colo. 58, 521 P.2d 1250 (1974) and *People v. Weaver*, 179 Colo. 331, 500 P.2d 980 (1972).

Here, the defendant was fully aware that his activities surrounding possession and sale of stolen firearms were the basis for his arrest and the agents' investigation. Questions regarding the source and the use of the .22 pistol found on him that day were foreseeable, and the defendant's *Miranda* waiver was valid and proper. Thus, the trial court properly refused to suppress the March 30 statement in which the defendant denied his presence and involvement in the Walker shooting.

The two subsequent statements were made almost two months and three and one-half months, respectively, after the first statement. The second statement, on May 26, was made under unique circumstances to Colorado law enforcement officials Konkel and Curtis, who had travelled to the Kansas City jail to interview the defendant. Kansas City jail personnel told the defendant that Colorado authorities

were there to see him and asked him if he wished to speak with them. The defendant agreed to the visit, told Curtis he wanted to get it off his chest and that he wanted to talk with them. The interview-visit was conducted in the jail day room, containing some desks and vending machines. The defendant was fully advised of his *Miranda* rights and, again, signed an acknowledgment and waiver form. The defendant then reviewed a summary of his oral statement, written by Konkel, corrected the statement, initialed the corrections and signed it.

The third statement, on July 13, was made to federal agents after defendant had been convicted of the firearms violations. He was readvised, at which point he said, "I understand my rights but I won't sign anything without my lawyer." The agents got up and started to leave. The defendant then told the agents, "I won't sign any forms without a lawyer, but I'll talk to you." The defendant then told the officers how he obtained the stolen .22 pistol and about the Walker killing.

The trial court correctly found that all of these statements were voluntary, and were made after a knowing and intelligent waiver. There was no error in admitting them.

Since the other contentions for reversal are without merit, the conviction should be affirmed.

SUPREME COURT, STATE OF COLORADO

December 2, 1985

CASE NO. 83SC145

THE PEOPLE OF THE STATE OF COLORADO,

Petitioner,

vs.

JOHN LEROY SPRING,

Respondent.

Certiorari to the Colorado Court of Appeals

EN BANC

JUDGMENT AFFIRMED

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JUSTICE LOHR delivered the Opinion of the Court.

JUSTICE ERICKSON dissents in part and
concurs in part.

JUSTICE ROVIRA joins in the dissent and concurrence.

JUSTICE KIRSHBAUM does not participate.

In *People v. Spring*, 671 P2d 965 (Colo. App. 1983), the Colorado Court of Appeals reversed the conviction of defendant John Leroy Spring for first degree murder because it concluded that the trial court erred in denying the defendant's motion to suppress certain statements made by him while in custody during questioning by police officers. We granted the People's petition for certiorari to review this holding. We also granted that part of the defendant's petition for certiorari in which he contends that the trial court committed reversible error by improperly limiting his right to present evidence in his own behalf through defense witnesses, an issue not reached by the court of appeals.¹

We agree with the court of appeals that the district court erred in denying the defendant's motion to suppress two of the three statements in question, and that a new trial is required as a result, although we do not agree fully with the reasoning of the court of appeals. We also affirm the court of appeals' holding that it was not established whether the third statement was the product of an illegally obtained statement and, therefore, that further proceedings are necessary to resolve the issue of attenuation if the People seek to introduce that statement into evidence at a retrial of Spring. Because certain errors alleged by Spring in his petition for certiorari are likely to arise again upon retrial, we address them in this opinion and conclude that the trial court was unduly restrictive in refusing to admit certain testimony offered by the defendant.

I.

Defendant John Leroy Spring was charged in Moffat County District Court with the first degree murder of Donald Walker.² Evidence presented at trial established

that Walker was shot to death during a nighttime elk hunt in early February of 1979 while in the company of Spring and another man, Donald Wagner. The three men had driven to a hunting site near Craig, Colorado. Walker was asked by one of the other men to walk ahead and search a ravine next to the road for elk. Wagner then asked Spring to shine a flashlight in the direction of Walker, whereupon Wagner fired a rifle shot that hit Walker in the head and dropped him to the ground. Wagner then approached the victim and fired a second shot, which resulted in Walker's death. Spring's defense at trial was that he had no knowledge that Wagner was going to shoot and kill Walker and that he assisted Wagner in burying Walker's body in the snow and in further concealing the murder because he was afraid of Wagner. Spring was convicted by a jury of first degree murder and sentenced to life imprisonment, and he appealed.

The court of appeals reversed the conviction, holding that statements made to officers by Spring on March 30, 1979, and July 13, 1979, while he was in custody, were taken in violation of his constitutional rights and that the People had failed to establish that a third statement, made by Spring on May 26, 1979, was not a fruit of the March 30 statement. Specifically, the court of appeals held that because Spring was not informed prior to the March 30 and July 13 interviews that the officers were going to question him about Walker's death, Spring's waivers of his right to remain silent and his right to counsel were not intelligent and knowing. With regard to the July 13 statement, the court of appeals also held that the officers improperly continued to question Spring about Walker's death after Spring told them that he did not want to talk about the subject. For these reasons, the court of appeals concluded

that the trial court committed reversible error when it refused to grant Spring's motion to suppress the three statements. *People v. Spring*, 671 P.2d at 966-67. We granted the People's petition for certiorari to review these suppression holdings.

The defendant also filed a petition for certiorari, arguing that the trial court committed a variety of errors during his trial in addition to the failure to suppress the challenged statements. We decided to review Spring's assertion that the trial court improperly limited his right to present evidence on his own behalf through defense witnesses. We begin with an examination of the suppression issues.

II.

Spring made three statements to law enforcement officers while in custody, each one after an advisement of rights and without an attorney present. Two of those statements were admitted into evidence at trial. The statements, and the circumstances surrounding their making, will be described in part B below. A review of the general principles governing the admissibility of statements made by a person in custody will be useful before considering the statements at issue.

A.

The prosecution may not use statements, whether exculpatory or inculpatory, stemming from custodial interrogation of the defendant unless it demonstrates that the defendant was warned adequately of his privilege against self-incrimination and his right to counsel and thereafter voluntarily, knowingly and intelligently waived those

rights. *Miranda v. Arizona*, 384 U.S. 436, 444-45, 467-76, 479 (1966); *People v. Lee*, 630 P.2d 583, 588 (Colo. 1981). The reason for the warning requirement is that, without such a safeguard, the compelling pressures inherent in police custody "work to undermine the individual's will to resist and to compel him to speak [where] he would not otherwise do so freely." *People v. Lee*, 630 P.2d at 588, quoting *Miranda v. Arizona*, 384 U.S. at 467. A consideration separate from the requirement of an advisement of rights and a valid waiver of those rights is that a statement obtained from a defendant is admissible only if made voluntarily. *Jackson v. Denno*, 378 U.S. 368 (1964); *People v. Thorpe*, 641 P.2d 935, 941 (Colo. 1982). A defendant's due process rights are violated if his conviction is founded, in whole or in part, upon an involuntary statement. *People v. Connelly*, 702 P.2d 722, 728 (Colo. 1985). Thus, when reviewing a motion to suppress a statement, and after determining that the statement was preceded by a proper *Miranda* advisement, a court is required to address both the effectiveness of the waiver of *Miranda* rights and the voluntariness of the statement itself. *People v. Pierson*, 670 P.2d 770, 775-76 (Colo. 1983); *People v. Fish*, 660 P.2d 505, 508 (Colo. 1983).³

First, the trial court must determine whether the defendant voluntarily, knowingly and intelligently waived his right to remain silent and his right to have counsel present. *People v. Pierson*, 670 P.2d at 775; *People v. Fish*, 660 P.2d at 508. "A waiver is valid if it is a knowing and intelligent relinquishment of a known right under the totality of the circumstances which in turn is determined by 'the particular facts and circumstances surrounding [that] case, including the background, experience, and conduct of the accused.'" *People v. Pierson*, 670 P.2d at 775, quoting *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). The burden of

proof is on the prosecution to prove by clear and convincing evidence that the defendant waived his constitutional rights. *People v. Fish*, 660 P.2d at 508. See *Miranda v. Arizona*, 384 U.S. at 475 (a "heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived" his rights). A valid waiver will not be presumed simply because a statement has been obtained from the defendant. *Miranda v. Arizona*, 384 U.S. at 475; *People v. Pierson*, 670 P.2d at 776. "Moreover, any evidence that the accused was threatened, tricked, or cajoled into a waiver will, of course, show that the defendant did not voluntarily waive his privilege." *Miranda v. Arizona*, 384 U.S. at 476.

If the court determines that the defendant validly waived his constitutional rights, the court must then decide whether the defendant's statement was voluntarily made. *People v. Pierson*, 670 P.2d at 776; *People v. Fish*, 660 P.2d at 508. The burden of proof is on the prosecution to establish by a preponderance of the evidence, considering the totality of the circumstances, that the statement was voluntary. *People v. Cummings*, 706 P.2d 766, 769 (Colo. 1985); *People v. Fish*, 660 P.2d at 508. Statements may not be admitted if they were obtained through promises, threats, violence, or any other improper influence. *People v. Cummings*, 706 P.2d at 769.

Findings of fact made by a trial court as part of its determination concerning the validity of a waiver of rights and the voluntariness of a statement will be upheld on appeal if supported by adequate evidence in the record. *People v. Cummings*, 706 P.2d at 769; *People v. Pierson*, 670 P.2d at 776; *People v. Freeman*, 668 P.2d 1371, 1378 (Colo. 1983); *People v. Fish*, 660 P.2d at 509, 510. However, the

appellate court may not ignore uncontradicted and credible evidence in the record that is contrary to the trial court's decision. *People v. Freeman*, 668 P.2d at 1378.

With these general principles in mind, we turn next to a description and analysis of the circumstances surrounding the making of the statements by Spring.

B.

Prior to trial, Spring filed a motion to suppress the relevant statements. After a hearing on March 17, 1980, the trial court issued a written order, which included findings of fact, denying the motion to suppress. The relevant facts concerning each statement that follow come from the trial court's findings of fact, supplemented where necessary by testimony given at the suppression hearing and by other facts in the record.

1. Statement of March 30, 1979.

Spring was arrested on March 30, 1979, in Kansas City, Missouri, by agents of the federal Bureau of Alcohol, Tobacco and Firearms (ATF) on charges of interstate transportation of stolen firearms and other related offenses. Acting upon information provided by an informant, George Dennison, the ATF agents had set up an undercover operation to purchase firearms from Spring, and Spring was arrested during this transaction.

Prior to Spring's arrest, the ATF agents also were told by Dennison that Spring had admitted that he and Wagner had killed Walker. At the time the ATF agents received the information from informant Dennison, Walker's body had not been discovered and no report had been made to the police about his disappearance. On March 22, 1979, a week

and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised to his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

9. The Court concludes that the statements made to Patterson and Sadowski on March 30, 1979, should not be suppressed, and may be admitted in evidence.

However, the March 30 statement was never introduced at trial. During trial, the trial court granted the defendant's motion *in limine*, ruling that Spring's statement that he "shot another guy once" was irrelevant and could not be admitted into evidence because the context of the discussion indicated that it did not relate to the Walker homicide. Although the court ruled that the remainder of the statement, including Spring's denial that he killed Walker, was admissible, neither the prosecution nor Spring chose to offer the statement into evidence.

The court of appeals held that it was error not to suppress the statement of March 30. The court first noted that at the time Spring's waiver was obtained, Spring had not been informed by the agents that they were going to question him about the Walker homicide. *People v. Spring*, 671 P2d at 966. The court of appeals then stated that a knowing and intelligent waiver of *Miranda* rights cannot occur if the defendant is not informed at the time of waiver as to the nature of the crime about which he is going to be questioned, and held:

The agents had a duty to inform Spring that he was a suspect, or to readvise him of his *Miranda* rights, before questioning him about the murder ... Because the agents failed to so advise, any waiver of rights in regard to questions designed to elicit information about Walker's death was not given knowingly or intelligently.

Id. at 966-67 (citations omitted). The court of appeals concluded that Spring's statement is "accordingly rendered inadmissible" and that his conviction must be reversed, *id.* at 967, apparently unaware that this statement had not been admitted into evidence at trial.

Although the failure to suppress the March 30 statement cannot be considered reversible error because the statement did not become part of the evidence at trial, whether the statement was obtained in violation of Spring's constitutional rights remains a relevant question. If the statement was illegally obtained, the prosecution must establish that any subsequent statement otherwise properly obtained from Spring and admitted into evidence was not the product of the tainted statement. *Wong Sun v. United States*, 371 U.S. 471 (1963); *People v. Lee*, 630 P2d 583, 590 (Colo. 1981); *People v. Lowe*, 200 Colo. 470, 475-76, 616 P2d 118, 123 (1980).

Although we agree that the March 30 statement should have been suppressed, we conclude that the court of appeals adopted and applied an improper legal standard to resolve the admissibility of the statement. As outlined above, the validity of Spring's waiver of constitutional rights must be determined upon an examination of the totality of the circumstances surrounding the making of the statement to determine if the waiver was voluntary, knowing and intelligent. *People v. Pierson*, 670 P2d at 775; *People v.*

and specifically killing a man named Walker and throwing his body in a snowbank in Colorado. The questions were not designed to gather information relating to a subject that was not readily evident or apparent to Spring. Spring had been advised to his right to remain silent, his right to stop answering questions, and to have an Attorney present during interrogation. He did not elect to exercise his right to remain silent or to refuse to answer questions relating to the homicide, nor did he request Counsel during interrogation.

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Fish, 660 P.2d at 508. No one factor is always determinative in that analysis. Whether, and to what extent, a suspect has been informed or is aware of the subject matter of the interrogation prior to its commencement is simply one factor in the court's evaluation of the total circumstances, although it may be a major or even a determinative factor in some situations. *Carter v. Garrison*, 656 F.2d 68, 70 (4th Cir. 1981) (per curiam); *United States v. McCrary*, 643 F.2d 323, 328-29 (5th Cir. 1981); *United States ex rel. Henne v. Fike*, 563 F.2d 809, 813-14 (7th Cir. 1977); *Collins v. Brierly*, 492 F.2d 735, 738-40 (3rd Cir.) (en banc) (and see at 741-43, Adams, J., dissenting), cert. denied, 419 U.S. 877 (1974); *State v. Carter*, 250 S.E.2d 263, 269 (N.C. 1979); *State v. Goff*, 289 S.E.2d 473, 476-77, 477 n.8 (W. Va. 1982).

We recognize that

[i]t is difficult to discern how a waiver of these rights could be knowing, intelligent and voluntary where the suspect is totally unaware of the offense upon which the questioning is based.

A valid waiver of constitutional rights does not occur in a vacuum. [A] waiver of the right to counsel and right to remain silent occurs in response to a particular set of facts involving a particular offense. The *Miranda* warnings are given not solely to make the suspect aware of the privilege, but also of the consequences of foregoing the privilege.

United States v. McCrary, 643 F.2d at 328-29 (footnotes omitted). It seems likely that a suspect's decision whether to consult with an attorney before answering questions will often be influenced by the seriousness of the matter underlying the interrogation. "It is a far different thing to forego a lawyer where a traffic offense is involved than to waive counsel where first degree murder is at stake." *Common-*

wealth v. Collins, 259 A.2d 160, 163 (Pa. 1969) (plurality opinion).

One factor often considered crucial to a court's determination as to the validity of a waiver when faced with facts similar to those presented here is the extent of the suspect's knowledge concerning the likely subjects and scope of the prospective questioning. Thus it is important to determine whether the questions were related to crimes or general subject matter about which the suspect anticipated interrogation, or whether the police led the suspect to believe that he would be questioned about one crime but then interrogated him about a totally unrelated offense. See, e.g., *Carter v. Garrison*, 656 F.2d at 70; *United States v. McCrary*, 643 F.2d at 328-29. In that connection, in the past we have upheld specific waivers because at the time of interrogation the defendants knew "the general nature of the crime involved." The fact that the defendants in those cases had not been informed before interrogation as to the specific crimes with which they were later charged did not render their waivers constitutionally infirm. *People v. Casey*, 185 Colo. 58, 61, 521 P.2d 1250, 1252 (1974); *People v. Weaver*, 179 Colo. 331, 335, 500 P.2d 980, 982-83 (1972). See also *Duncan v. People*, 178 Colo. 314, 318, 497 P.2d 1029, 1031 (1972); *People v. Herrera*, 633 P.2d 1091, 1094 (Colo. App.), cert. denied (Colo. 1981); *Commonwealth v. Dixon*, 379 A.2d 553, 556 (Pa. 1977); *State v. Goff*, 289 S.E. 2d at 477 n.8.

The federal district court in Montana has adopted an absolute rule that a waiver of *Miranda* rights can never be intelligent, knowing and voluntary when the suspect is not "told of the crime he is suspected of having committed" before questioning begins. *Schenck v. Ellsworth*, 293 F.

Supp. 26, 29 (D. Mont. 1968). The Pennsylvania Supreme Court adopted a less demanding, but still absolute, rule that "a valid waiver of *Miranda* rights requires that the suspect have an awareness of the general nature of the transaction giving rise to the investigation." *Commonwealth v. Dixon*, 379 A.2d at 556 (footnote omitted). We believe it to be more consistent with standards governing the validity of a waiver to consider the extent of the suspect's understanding of the subject matter and the source of that understanding, simply as factors in the totality of circumstances surrounding the making of a statement. We decline to elevate those considerations into an absolute rule that renders any waiver automatically invalid when the interrogated suspect has not been informed of the subject matter of the questioning prior to its commencement.

Obviously, a most serious obstacle to the establishment of a voluntary, knowing and intelligent waiver of *Miranda* rights will be presented when the suspect is *totally* unaware of the subject matter of the interrogation at the time he agrees to waive his rights and answer questions. What must be remembered is that an awareness may come from many sources, not only from a direct and explicit statement by the interrogating officers, and that the awareness can vary from a specific knowledge of the crime upon which the questioning will focus to a general understanding of the subject matter in which the interrogators are interested. Thus, an examination of the totality of the circumstances is proper and necessary to determine, among other things, the extent of the suspect's awareness of the subject matter of the investigation and the impact of this awareness, or lack of awareness, on the suspect's decision to waive his constitutional rights.

Here, the absence of an advisement to Spring that he would be questioned about the Colorado homicide, and the lack of any basis to conclude that at the time of the execution of the waiver, he reasonably could have expected that the interrogation would extend to that subject, are determinative factors in undermining the validity of the waiver. The ATF agents did not advise Spring that a part of their interrogation would include questions about the Colorado homicide prior to Spring's decision to waive his constitutional rights and to answer questions. Spring had no reason to suspect that the federal agents who had just arrested him in Kansas City during a firearms transaction that allegedly violated federal law would question him about a murder that occurred in Colorado, a crime not only in a distant jurisdiction but also outside of the normal purview of the federal Bureau of Alcohol, Tobacco and Firearms and totally unrelated to the transaction that gave rise to the arrest and interrogation. Moreover, the federal crime that occasioned the interrogation, and about which Spring was cognizant when he signed the written waiver and agreed to answer questions, represented a relatively less serious matter than first degree murder. Although the background and experience of the suspect is a further relevant consideration in determining the validity of any waiver, *People v. Pierson*, 670 P.2d at 775, the record offers little with regard to Spring's intelligence or acquaintance with the criminal justice process, other than the fact that Spring had a criminal record. Given these facts, it cannot be said that the prosecution carried its burden of proving by clear and convincing evidence that Spring made a voluntary, knowing and intelligent decision to forego counsel and to answer questions concerning the murder.⁵.

The district court concluded that the "questions them-

selves suggested the topic of inquiry." Certainly, nothing about the questions concerning the federal firearms crimes or about Spring's past criminal record could have suggested to Spring that the topic of inquiry would soon be a Colorado homicide. According to the district court, it is only by the exact questions at issue—whether Spring had killed anyone else, whether he had ever been in Colorado and whether he had shot a man named Walker west of Denver and thrown his body in a snowbank—that Spring became acquainted with the subject of the inquiry. But, the mere fact that a suspect answers questions, without more, does not establish that a valid waiver has occurred. *Miranda v. Arizona*, 384 U.S. at 475. These questions were asked long after Spring had signed the written waiver and agreed to talk to the officers. In the present context, we agree with the Pennsylvania Supreme Court that

"[o]nce an accused has signed the waiver stating that he is willing to give a statement, it is no longer efficacious that he then be told what he is being questioned about. *The compulsive force of the unintelligent waiver has already had its effect.*" By this we do not mean to establish a *per se* rule that no post-waiver action taken by police to inform the defendant of the transaction involved can ever be effective . . . ; we do hold, however, that a valid waiver will not be found simply because a suspect lacked the presence of mind to halt the interrogation and assert his constitutional rights the moment he was asked a question that revealed the nature of the criminal episode under investigation. Nor is our view in the present case altered by the fact that the police waiver form signed by [the accused] expressly advised the accused that she had the right to call a halt to the questioning. While inclusion of this provision is to be commended, it does little by itself to mitigate the psychological *fait accompli* of the written waiver.

Commonwealth v. Dixon, 379 A.2d at 557 (footnote and

citation omitted), quoting *Commonwealth v. Collins*, 259 A.2d 160, 163-64 (Pa. 1969) (plurality opinion) (emphasis added in *Dixon*).

For these reasons, we conclude that the People did not meet their heavy burden of proving that Spring's answers to questions relevant to the Colorado homicide were made after a voluntary, knowing and intelligent waiver of rights. We agree with the court of appeals that the answers were illegally obtained and that the district court erred by refusing to grant the defendant's motion to suppress the statement of March 30.

2. Statement of May 26, 1979.

While in jail in Kansas City on May 26, 1979, Spring gave a statement concerning the homicide to Detective Curtis of the Moffat County Sheriffs Department and Agent Konkel of the Colorado Bureau of Investigation. The officers gave Spring a *Miranda* advisement similar in its essentials to the one given by the ATF agents on March 30 and described above, and Spring again executed a written acknowledgement and waiver of his rights. In answer to the officers' questions, Spring acknowledged that he accompanied Wagner and Walker on the elk hunt, that either he or Wagner suggested that Walker go into the ravine to find an elk, that Wagner told Spring to shine his flashlight in the direction of Walker, that Spring was holding the flashlight when Wagner shot Walker, that Spring or Wagner emptied the victim's pockets, that Spring assisted Wagner in dragging Wagner's body five or ten feet from where he was killed, and that Spring participated with Wagner in lying about the whereabouts of Walker afterwards. And, according to Detective Curtis, Spring told the officers that

he knew or had an idea that something might happen to Walker that night. Spring did not tell Curtis and Konkel that he had no knowledge that Wagner was going to shoot Walker that evening or that his own actions were compelled by his fear of Wagner, as Spring offered in his defense at trial. After the questioning was completed, Spring read, edited and signed a written statement, prepared by Konkel and summarizing the interview.

As part of his motions to suppress, Spring argued that the May 26 statement, otherwise the product of a valid advisement and waiver, should be suppressed as the direct fruit of the illegally obtained statement of March 30. Because the district court concluded that the statement of March 30 was not illegally obtained, it did not consider or decide whether the May 26 statement was the fruit of the March 30 statement. The May 26 statement subsequently was received in evidence at trial, and Spring later echoed, supplemented and explained that statement in his own testimony.

Because of its ruling that the statement of March 30 was illegally obtained, the court of appeals held that the People had the burden to prove that the statement obtained from Spring by the Colorado officers on May 26 was not the "fruit of the poisonous tree" of the statement of March 30. *See People v. Lowe*, 200 Colo. at 475-76, 616 P.2d at 123. This burden had not been met. *People v. Spring*, 671 P.2d at 967. If the People sought the admission of the May 26 statement on retrial, "the trial court must first resolve the issue of attenuation from the tainted statement of March 30." *Id.*

The People argue that if we agree with the court of appeals that the statement of March 30 was illegally

obtained, as we have, then we should decide, on the basis of the record made at the suppression hearing, whether the May 26 statement was the direct fruit of the March 30 statement. We conclude instead that the trial court must resolve the attenuation issue by the application of the appropriate standards to the evidence, *see People v. Briggs*, 83SC134, slip op. at 6-7 (Colo. November 18, 1985), with leave to hold a supplemental hearing for the presentation of further evidence if deemed necessary by the district court.⁶

3. Statement of July 13, 1979.

After Spring had been found guilty of the federal firearms violations, ATF agents Patterson and Wactor interviewed Spring on July 13, 1979, in the Jackson County Jail. The trial court found that the primary purpose for conducting this interview, a purpose apparently made known to Spring at the outset, was to obtain information from him concerning the whereabouts of additional firearms and explosives. When the interview began, Spring was not told that he would be questioned about the Walker homicide.

Spring again was advised of his rights in an advisement identical to the one he received before his interrogation on March 30. Spring acknowledged that he understood his rights, but declined to sign any form without consulting an attorney. The agents got up to leave, whereupon Spring stated that he would talk to the agents without an attorney being present; however, he would not sign the written acknowledgement and waiver form. On that basis, the agents resumed the interview.

The interrogation apparently began with a wide-ranging discussion of the whereabouts of various firearms and

explosives of which Spring might be aware, along with related subjects. As part of this discussion, Spring was asked where he had obtained a .22 caliber pistol that the agents had seized from him at the time of his arrest. Spring replied that it had been Walker's gun. Asked if he took the gun off Walker's body, Spring said, "I'd rather not talk about that." Later, the agents asked Spring if he had shot Walker and, subsequently, if Wagner had shot Walker. To both questions, Spring again replied, "I'd rather not talk about that." At some point in the interview, Spring was willing to state that he had been in Colorado in 1979 and that he, Wagner and Walker had been riding around together. According to Agent Wactor, Spring also stated that "prior to Mr. Walker's going down into the ravine that he had obtained the .22 caliber pistol from Mr. Walker" and, in another portion of Wactor's testimony, that "[Spring] did admit to getting Walker's gun away from him before he went to flush deer out of [the] ravine." Agent Wactor also asked Spring, "Is it safe to assume that you, Wagner and Walker went out together and that only you and Wagner came back alive?" Spring replied, "Yeah, you could say that." According to the agents, Spring either grinned or laughed while saying this.

The record contains no recording or transcript of the July 13 interrogation. Only Agent Wactor's brief, handwritten notes were placed into evidence. It is not clear in what sequence the questions concerning the Walker homicide were asked and answered, or not answered, and at what points in the interview these questions were asked. Nor can we tell with any certainty what unrelated questions, if any, were asked in between questions concerning the killing of Walker. Both agents testified that whenever Spring stated that he did not want to talk about some aspect of the Walker

murder, the subject was changed to a separate topic. Agent Wactor testified that the questions about the killing of Walker were not interspersed with questions about wholly unrelated matters; Agent Patterson gave contrary evidence that general conversation about matters unrelated to the Walker homicide occurred between questions about Walker's death.

The district court declined to suppress the July 13 statement. As part of its findings, the court stated, "Spring did understand that he had the right not to answer questions, and exercised that right with respect to several specific questions." The court again rejected Spring's argument that the waiver was not valid because he was not advised prior to the interview that he would be questioned about the homicide. The court concluded that the questions concerning the homicide were not "ruse questions" designed to trick an unwary person and noted that at the time of the interview, Spring had already talked with the Colorado authorities about the murder and that an information and warrant charging Spring with Walker's murder had been issued. Through the testimony of the agents, portions of the July 13 statement subsequently were received in evidence at trial.

The court of appeals held that the trial court committed reversible error in admitting the statement of July 13, 1979, for two reasons. First, the court of appeals noted that "when the agents began asking about the homicide, Spring answered, 'I'd rather not talk about that.' The agents shifted the interview to other topics, but returned again to the homicide. This process was repeated until the agents obtained an incriminating response." *People v. Spring*, 671 P.2d at 967. The court of appeals noted also that "[o]fficers

who meet with a refusal to make any statement during an attempted in-custody interrogation are not permitted periodically to repeat the procedure until the accused finally makes a statement. *Dyett v. People*, 177 Colo. 370, 494 P.2d 94 (1972)." *Id.* For that reason, the court concluded that Spring exercised his right to silence as to matters concerning the homicide, and the officers violated that right by continuing to question Spring and obtaining a statement. Second, the court again held that Spring was entitled to renewed *Miranda* warnings when the agents began to question him about the murder, which was a topic not related to their stated purpose for the interview. *People v. Spring*, 671 P.2d at 967.

We conclude that the statement should have been suppressed, although we do not agree with all of the reasons given by the court of appeals. In particular, for the reasons discussed above, we do not approve of the court of appeals' adoption of a *per se* rule rendering invalid any waiver of *Miranda* rights when the defendant answers questions, without a renewed *Miranda* advisement, on a subject about which he was not informed before the interrogation. We conclude, however, that the evidence in the record, when viewed in the light of the totality of the circumstances and the requirements of *Miranda v. Arizona*, does not support the trial court's finding that Spring's July 13 statement was the result of a valid waiver of constitutional rights.

In *Miranda v. Arizona*, the United States Supreme Court stated that the procedure to be followed after a *Miranda* advisement is clear. "If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must

cease." 384 U.S. at 473-74 (footnote omitted; emphasis added). We recognize that an individual might refuse to answer certain questions yet voluntarily and intelligently decide to answer others during the course of a single interrogation, and a waiver established under such circumstances may be valid and effective. However, it must not be forgotten that the government carries a "heavy burden" to demonstrate that the waiver is voluntary. *Miranda v. Arizona*, 384 U.S. at 475. See also *People v. Fish*, 660 P.2d at 508. Once the defendant has indicated in any way that he does not wish to answer a question or questions, the interrogating officers have an affirmative and emphatic duty to determine whether the suspect is in fact exercising his privilege against self-incrimination in all respects or is merely reluctant to answer particular questions. See *People v. Lowe*, 200 Colo. at 477, 616 P.2d at 123-24, *Dyett v. People*, 177 Colo. at 372-73, 494 P.2d at 95. Simply continuing the interrogation along similar or even unrelated lines rarely will satisfy the requirements of *Miranda*. And the fact that a statement is eventually made by the defendant is not determinative. "[A] valid waiver will not be presumed . . . simply from the fact that a confession was in fact eventually obtained." *Miranda v. Arizona*, 384 U.S. at 475; *People v. Pierson*, 670 P.2d at 776.

Here, there is no evidence that the ATF agents made any effort to reaffirm Spring's decision to waive his constitutional rights after he declined to answer particular questions. Nor did they make any effort to establish that by refusing to answer certain questions about the shooting of Walker, Spring did not intend to exercise his privilege against self-incrimination with regard to the entire subject from that point forward. They simply continued to interrogate Spring until they received answers to questions about

the Walker homicide. Without a transcript or equivalent evidence showing the sequence and wording of the questions asked and Spring's answers, we cannot say that the evidence supports the district court's finding that Spring only exercised his right to remain silent "with respect to several specific questions," and that the waiver remained valid with respect to all of his answers to the other questions.

For this reason alone, the record does not support the trial court's finding that the prosecution met its burden of proving by clear and convincing evidence that the defendant knowingly, intelligently and voluntarily waived his constitutional rights to remain silent and to have counsel present when he uttered the July 13 statement. We agree with the court of appeals that the trial court erred in failing to suppress this statement.

The People have not argued that the admission of this statement was harmless error, and it obviously cannot be considered harmless under the circumstances. Before a constitutional error can be considered harmless, a court must be satisfied beyond a reasonable doubt that the error did not affect the jury's ultimate resolution of the case. *Harrington v. California*, 395 U.S. 250 (1969); *Chapman v. California*, 386 U.S. 18 (1967); *LeMasters v. People*, 678 P.2d 538, 538-39, 544 (Colo. 1984). The matters contained in the statement of July 13 were generally cumulative of other evidence, assuming, for this purpose, that the May 26 statement was properly admitted.⁷ However, the admission at trial of the particular statement from Spring concerning Walker's gun, a fact added by the July 13 statement, was clearly prejudicial to Spring. At trial, both Agent Wactor and Agent Patterson testified that Spring said he talked

Walker into leaving his firearm behind in the van before Walker went towards the ravine. A jury might infer from this evidence the necessary premeditation on the part of Spring on the grounds that Spring intentionally disarmed Walker so that Walker could not protect himself. As Spring's primary defense at trial was that he had no knowledge that Wagner was going to shoot Walker that evening, this added fact, although circumstantial, cannot be considered harmless.

Accordingly, the admission of the July 13 statement constitutes reversible error, and Spring's conviction must be reversed for that reason. A new trial is required, and, as the court of appeals ordered, the trial court must resolve the issue of attenuation if the People seek the introduction of the May 26 statement on retrial.

III.

Spring argues that the trial court prevented him from telling his side of the story to the jury. The scope of the direct examination of witnesses, including witnesses for the defense, is generally a matter within the sound discretion of the trial court. *People v. Reynolds*, 194 Colo. 543, 547, 575 P.2d 1286, 1290 (1978). However, an abuse of discretion by a trial court in restricting the direct examination of defense witnesses may compel the reversal of a conviction. *Id.* We conclude that the trial court unduly restricted Spring's own testimony, although it is not necessary for us to determine whether reversible error occurred given our holding in part II. Because the errors are likely to occur again upon a retrial of Spring, we elect to address these evidentiary

questions briefly in this opinion.⁸

The first ruling objected to occurred when Spring sought to explain why he and Wagner invited Walker to accompany them on the elk hunt. According to Spring, Wagner and he went hunting and shot a deer the night before, and Spring related this to Walker. The trial court would not allow Spring to testify that Walker responded by being upset about their failure to invite him along and that, because Walker was upset, Spring and Wagner included him in their plans to go elk hunting the next night. The trial court also refused to allow Spring to testify as to statements made by Wagner and by Mike Knez, a friend of Spring and Wagner, that were made on the day of the shooting and also concerned the plans for the elk hunt. The trial court excluded these statements, concluding:

The danger—the risk here as I perceive it, Mr. Bratfisch [Spring's attorney], is that through this witness and his own statements concerning what was said in conversations of other people, he is in essence stating not what is happening in his mind but creating conversations which he—or discussing conversations which tend to have—indicate that there was a corroborative effect from other persons as to whatever may have been in his mind and I think this is possibly misleading and I think it's clearly hearsay and shouldn't come in for that purpose. I think the witness is entitled to say what his—was in his mind at that time. But I don't think he's entitled to try to corroborate it by embellishing upon particular conversations that occurred which are hearsay and would constitute hearsay evidence.

Spring argues that these statements were relevant and were not hearsay, as their admission was not sought to prove the truth of the matters asserted but to explain

Spring's state of mind, i.e., his innocent motive in participating in the elk hunt.

The defendant is correct. Out-of-court statements offered not to prove the truth of the matter asserted but offered because they tend to explain the state of mind of someone other than the declarant are not hearsay and should be admitted if relevant. See CRE 801(c) (definition of "hearsay"); *People v. Burress*, 183 Colo. 146, 150-54, 515 P.2d 460, 462-64 (1973). Also, the defendant is entitled to present evidence corroborating his own testimony about his actions and mental state. See *People v. Green*, 38 Colo. App. 165, 167, 553 P.2d 839, 840 (1976). The fact that the corroborative evidence in this instance also was in the form of testimony by the defendant is simply a factor for the jury to consider in deciding what weight to give to that corroboration. The trial court should not exclude this evidence if properly presented on retrial.

Similarly, Spring argues that the district court would not allow him to testify as to what Wagner said to Spring, or to others in Spring's hearing, that compelled Spring to assist Wagner in concealing the murder and to refrain from telling the complete story when first interviewed by law enforcement officials. Without going into detail about the merits of individual rulings, we conclude that evidence of this type is relevant and should be admitted on retrial if presented by the defendant in proper form.

IV.

For the reasons given, the judgment of the court of appeals is affirmed, and the case is remanded to that court to be returned to the trial court for further proceedings consistent with this opinion.

JUSTICE ERICKSON dissents in part and concurs in part.

JUSTICE ROVIRA joins in the dissent and concurrence.

JUSTICE KIRSHBAUM does not participate.

FOOTNOTES

1. As one issue in his petition for certiorari, Spring argued that the trial court improperly limited his opening statement, his cross-examination of two prosecution witnesses and his direct examination of defense witnesses. We did not order review of this entire issue; rather, we granted certiorari only to review Spring's assertion that he was improperly prevented from presenting evidence on his own behalf through defense witnesses. Nevertheless, both the People and Spring argued the "opening statement" and "cross-examination" issues in their briefs. We decline to discuss these issues other than to state that we have reviewed the record and conclude that the district court did not abuse its discretion or commit reversible error with regard to these matters.
2. Spring was charged with that form of first degree murder that is committed "[a]fter deliberation and with the intent to cause the death of a person other than [the actor]." § 18-3-102(1)(a), 8 C.R.S. (1978).
3. We have held that a trial court must follow a two-step analysis when reviewing a motion to suppress a statement—first determining whether the defendant voluntarily, knowingly and intelligently waived his *Miranda* rights and, if so, then determining whether the statement was made voluntarily. *People v. Fish*, 660 P.2d at 508. The prosecution carries a different burden with respect to each phase of the analysis. *Id.* We recognize, however, that both steps involve an inquiry into the totality of the circumstances surrounding the making of the statement in an attempt to ascertain the voluntariness of the defendant's actions. For that reason, in many cases the consideration of the two factors may not be neat and distinct. The findings made by the trial court in this case reflect that reality—the court did not analyze each issue separately but rather reviewed the factual circumstances surrounding the making of the statements and made joint conclusions as to the waiver and the voluntariness of each statement. As long as the evidence supports findings by a trial court that a voluntary, knowing and intelligent waiver and a voluntary statement were made by the defendant when viewed in the light of the total circumstances, taking into account the separate burdens placed on the prosecution and the real differences between the two factors, the findings should not be rejected even though the trial court does not cleave the analysis formalistically into two parts.
4. Although these are rights that are guaranteed to the defendant, see *Miranda v. Arizona*, 384 U.S. at 444-45, 473-74, *Miranda* did not require that the defendant be advised of these rights. *Miranda v. Arizona*, 384 U.S. at 444, 467-73, 479; *People in the Interest of M.R.J.*, 633 P.2d 474, 476 (Colo. 1981). Even though not required, we commend and encourage the inclusion of this information in any *Miranda* advisement.
5. A contrast to the other subject matter of the March 30 interview may

be instructive. Given the circumstances surrounding Spring's arrest and subsequent interrogation, it could not be argued convincingly that the ATF agents were required to inform Spring explicitly before the interrogation that he would be questioned about the firearm transaction in the parking lot and that any waiver obtained without such an advisement would be invalid.

6. In their petition for rehearing, the People for the first time raise the argument that *Oregon v. Elstad*, 105 S. Ct. 1285 (1985), makes the statement of May 26, 1979, admissible without regard to attenuation. We elect not to address this issue, but the People are free to assert this argument to the trial court in further proceedings on remand.
7. As previously noted, however, the admissibility of the May 26 statement is dependent upon the determination of an attenuation issue. See Part II B 2, above.
8. Spring also argues that the trial court improperly limited his examination of two other defense witnesses, Michael Kopp and Becky Spring. After reviewing the record, we conclude that each of the matters challenged either is not likely to recur in a new trial or that the district court did not err, and we decline to discuss these matters further.

PEOPLE V. SPRING
NO. 83SC145

JUSTICE ERICKSON dissenting in part and concurring in part:

I respectfully dissent to part II of the majority opinion. The court of appeals held that a suspect cannot voluntarily waive his *Miranda* rights unless he is informed of the crime about which he is to be questioned. *People v. Spring*, 671 P.2d 965 (Colo. App. 1983). The majority rejects the absolute rule adopted by the court of appeals and holds that a suspect's knowledge of the crime is only one factor to be considered in determining the validity of the waiver. In this case, however, the court concludes that the failure of the federal agents to inform Spring that he was a suspect in the Walker homicide is a sufficient basis for holding his waiver of *Miranda* rights on March 30, 1979 invalid. I disagree.

Law enforcement officers have no duty under *Miranda* to inform a person in custody of all charges being investigated prior to questioning him. *Carter v. Garrison*, 656 F.2d 68, 70 (4th Cir. 1981) (per curiam), cert. denied, 455 U.S. 952 (1982); *State v. Carter*, 296 N.C. 344, 250 S.E. 2d 263, 268, cert. denied, 441 U.S. 964 (1979); W. LaFave & J. Israel, *Criminal Procedure* 306 (1985). All that *Miranda* requires is that the suspect be advised that he has the right to remain silent, that anything he says can and will be used against him in court, that he has the right to consult with a lawyer and to have the lawyer present during interrogation, and that if he cannot afford a lawyer one will be appointed to represent him. *Miranda v. Arizona*, 384 U.S. 436, 467-79 (1966). As one court has stated:

We have serious reservations about an interpretation of *Miranda v. Arizona* . . . which would require that before custodial interrogation begins, in addition

to the mandated declarations, a statement must be made by the police as to the nature of the crime under investigation. That landmark decision was painstakingly specific in listing the basic constitutional rights which the police must propound to a suspect before he is questioned. Nowhere is there the slightest indication that there must be included a warning about the nature of the crime which has led to the interrogation conference, what the penalty is for the offense, what the elements of the offense consist of, and similar matters. ... In a sense, all of these elements might conceivably enter into an "intelligent and understanding" rejection of an offer for the assistance of counsel, but the simple answer is that *Miranda* does not by its terms go so far. It requires that the accused be advised of his rights so that he may make a rational decision, not necessarily the best one or one that would be reached only after long and painstaking deliberation. Indeed, it may be argued forcefully that a choice by a defendant to forego the presence of counsel at police interrogation is almost invariably an unintelligent course of action. It is not in the sense of shrewdness that *Miranda* speaks of "intelligent" waiver but rather in the tenor that the individual must know of his available options before deciding what he thinks best suits his particular situation. In this context intelligence is not equated with wisdom.

Collins v. Bierly [sic], 492 F.2d 735, 738-39 (3rd Cir.), cert. denied, 419 U.S. 877 (1974) (footnote and citation omitted).

Here, Spring was advised twice of his *Miranda* rights before he was questioned on March 30, 1985—first at the time of his arrest and then immediately before the interrogation. Spring was also informed that he had the right to stop the questioning at any time. Thus, the warnings given to Spring exceeded the requirements of *Miranda*.

In concluding that Spring validly waived his *Miranda* rights on March 30, 1979, the trial court properly considered the totality of the circumstances under which the

waiver was made. *North Carolina v. Butler*, 441 U.S. 369, 374-75 (1979); *People v. Pierson*, 670 P.2d 770, 775 (Colo. 1983). The court found that Spring "was aware of his right to remain silent, to have counsel present during interrogation, to stop the interrogation at any time; and that his responses were made freely, voluntarily and intelligently." The trial court's findings should not be disturbed on appeal if supported by adequate evidence in the record. *Pierson*, 670 P.2d at 770, 776.

Here, there is ample evidence to support the trial court's conclusion that Spring waived his *Miranda* rights. Prior to any questioning, Spring signed a written acknowledgment and waiver of his rights to remain silent and to have counsel present. Such an express waiver is strong proof of its validity. *North Carolina v. Butler*, 441 U.S. at 373. Additionally, nothing in the record suggests that Spring did not understand the warnings given to him, the nature of his fifth amendment rights, and the consequences of waiving those rights. *Fare v. Michael C.*, 442 U.S. 707, 726 (1979). He was a convicted felon who had considerable experience with the police. He was not "worn down by improper interrogation tactics or lengthy questioning or by trickery or deceit." *Id.* at 727.

The majority nonetheless rejects the findings of the trial court on the sole ground that Spring was not advised that he would be questioned about the Walker homicide. In my view, a waiver of *Miranda* rights should never be held invalid simply because the suspect is not informed or does not know in advance of all matters that are under investigation and will be the subject of interrogation. The effect of the majority opinion is to add to the *Miranda* warnings the requirement that the police disclose all possible crimes that

might be the subject of interrogation. The practical difficulties of satisfying this requirement are obvious. Prior to questioning a suspect, the police may have insufficient information to determine what charges will ultimately be filed against him. The nature of the offense may depend upon circumstances unknown to the police, such as whether the suspect has a criminal record. It may also turn upon an event yet to occur, such as whether the victim of the crime dies. Therefore, I reject the majority's conclusion that Spring's waiver of his *Miranda* rights on March 30, 1979 was invalid simply because he was not informed of all matters that would be reviewed when he was questioned by the police.

I would also uphold the trial court's refusal to suppress the statements made by Spring to Colorado law enforcement officers on May 26, 1979. When Spring was told that the Colorado authorities wished to speak with him, he readily agreed to do so. The officers orally advised Spring of his *Miranda* rights, and he then signed a written acknowledgment and waiver form. Spring told the officers that he agreed to talk to them about the Walker homicide because he "wanted to get it off his chest." The interview was conducted in the day room of the jail and lasted only one hour and thirty minutes. Spring talked freely to the officers about his participation in the Walker homicide. At no time did he refuse to answer questions or request the presence of counsel. Nothing in the record indicates that the officers conducted the interview in a coercive manner. At the conclusion of the interview, Spring read, edited, and signed a written statement prepared by one of the officers summarizing the interview. In my view, the trial court correctly found that the statement given by Spring was made freely, voluntarily, and intelligently, after a proper *Miranda*

advisement and waiver.

Finally, I agree with the majority that the trial court erred in not suppressing the statement made by Spring on July 13, 1979. In light of Spring's refusal to answer certain questions regarding the Walker shooting, the agents should have then determined if Walker sought to invoke his right against self-incrimination on that subject. Their failure to do so renders Spring's purported waiver of his *Miranda* rights invalid.

I am authorized to say that Justice Rovira joins me in this dissent and concurrence.

January 13, 1986

No. 83SC145 and 83SC155 — *The People of the State of Colorado vs. John Leroy Spring*

Please substitute the enclosed pages 22, 29, 30 and 34 with the like pages of the opinion issued on December 2, 1985.

The opinion was modified, and as modified, the Petitions for Rehearing were denied.

JUSTICE ERICKSON and JUSTICE ROVIRA would grant the People's petition.

JUSTICE KIRSHBAUM does not participate.

MAC V. DANFORD, Clerk
Colorado Supreme Court

By: _____
Chief Deputy

NOTE: The modifications basically represent the addition of footnote 6, reference on page 22 just above "3." Subsequently the footnote numbers on pages 29 and 30 also had to be changed. On page 34, the text of the new footnote 6 has been inserted and the numbers only of the footnotes that follow were changed.

CERTIFICATE OF MAILING

I, John Milton Hutchins, a member of the bar of this court, herewith certify that the within PETITION FOR WRIT OF CERTIORARI has been deposited in the United States Mail, first-class postage prepaid, addressed to Mr. Joseph Spaniol, Jr., Clerk of the Court, Supreme Court of the United States, Washington, D.C. 20593 and that to my knowledge the mailing took place on March 14, 1986, within the permitted time for filing the brief.

FOR THE ATTORNEY GENERAL

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AG File No. BAP8601119/2C

Subscribed and sworn to before me in the County of _____, State of Colorado, this _____ day of _____ 1986.

NOTARY PUBLIC

My Commission expires: _____

CERTIFICATE OF SERVICE

This is to certify that I have duly served the within PETITION FOR WRIT OF CERTIORARI TO THE COLORADO SUPREME COURT upon all parties herein by depositing copies of same in the United States mail, postage prepaid, at Denver, Colorado this 14th day of March 1986, addressed as follows:

Lynda H. Knowles
Deputy State Public Defender
1362 Lincoln Street, Suite 205
Denver, CO 80203

AG File No. BAP8601119/C